

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

2002 JUL 25 PM 1:50

LODGING CONCEPTS, INC.,

Plaintiff,

vs.

FIRST BASE FOR WOMEN, LLC and
ACCEL, INC.,

Defendants.

Clerk
U. S. DISTRICT COURT
Civil Action No. 02-C-50164

ANSWER AND AFFIRMATIVE DEFENSES
OF DEFENDANT, ACCEL, INC.

COUNT I

NOW COMES the Defendant, ACCEL, INC., an Ohio corporation, hereinafter "ACCEL", by its attorneys, MAGGIO & FOX PROFESSIONAL CORPORATION, and respectfully states that no response is required to Count I of the Complaint, since said Count is directed only to the Defendant, FIRST BASE FOR WOMEN, LLC, an Ohio Limited Liability Company.

COUNT II

NOW COMES the Defendant, ACCEL, INC., an Ohio corporation, hereinafter "ACCEL", by its attorneys, MAGGIO & FOX PROFESSIONAL CORPORATION, and as its Answer to Count II of the Complaint, states as follows:

1. ACCEL admits the allegations contained in ¶1 of Count II of the Complaint.

2. ACCEL admits the allegations contained in ¶2 of Count II of the Complaint. Furthermore, ACCEL admits that Exhibit "A" is attached to the Complaint, but states that said Exhibit speaks for itself.

3. ACCEL admits the allegations contained in ¶3 of Count II of the Complaint.

4. ACCEL admits that Exhibit "B" is attached to the Complaint and that said Exhibit speaks for itself. ACCEL denies any allegation contrary to that set forth in Exhibit "B". ACCEL admits the remaining allegations contained in ¶4 of Count II of the Complaint.

5. ACCEL states that a Purchase Order between FIRST BASE FOR WOMEN, LLC and Plaintiff originally provided that the product would be sent in seven (7) shipments. However, subsequent to the Purchase Order being issued, the parties engaged in additional negotiations regarding the manufacture and shipment of the product. The Purchase Order was modified pursuant to oral agreement and confirmed in writing. The modification provided that the amount of units being purchased was equal only to the amount of units which were prepaid by FIRST BASE prior to being manufactured by the Plaintiff. ACCEL further states that the agreement modified the scheduled shipment dates identified in ¶5 and identified in the Purchase Order. ACCEL denies the remaining allegations contained in ¶5 of Count II of the Complaint.

6. ACCEL lacks knowledge as to the veracity of the allegations contained in ¶6 of Count II of the Complaint, therefore denies the same and places upon the Plaintiff the strictest burden of proof with respect thereto.

7. ACCEL admits the allegations contained in ¶7 of Count II of the Complaint.

8. ACCEL admits that FIRST BASE notified Plaintiff regarding the marketing of the breast self-exam shower kits and that FIRST BASE discussed the modification of the terms of the Purchase Order. ACCEL denies the remaining allegations contained in ¶8 of Count II of the Complaint.

9. ACCEL admits that representatives of Plaintiff and FIRST BASE met to specifically discuss modification of the Purchase Order. ACCEL states that the modification of the Purchase Order changed the terms of the contract to provide that the amount of units being purchased was equal only to the amount of units which were prepaid by FIRST BASE prior to being manufactured by Plaintiff. The ship dates and the amount of the units being purchased were changed from the Purchase Order to provide for flexible ship dates and for purchase of only the amount of units reflected in the prepaid order confirmations. ACCEL denies the remaining allegations contained in ¶9 of Count II of the Complaint.

10. ACCEL states that FIRST BASE did not authorize the manufacture of the third shipment. ACCEL denies the remaining allegations contained in ¶10 of Count II of the Complaint.

11. ACCEL denies the allegations contained in ¶11 of Count II of the Complaint.

12. ACCEL lacks knowledge as to the veracity of the allegations contained in ¶12 of Count II of the Complaint, therefore denies the same and places upon the Plaintiff the strictest burden of proof with respect thereto.

13. ACCEL admits the allegations contained in ¶13 of Count II of the Complaint.

14. ACCEL admits the allegations contained in ¶14 of Count II of the Complaint.

15. ACCEL admits that Exhibit "C" is attached to the Complaint and states that said Exhibit speaks for itself. ACCEL admits the remaining allegations contained in ¶15 of Count II of the Complaint.

16. ACCEL denies the allegations contained in ¶16 of Count II of the Complaint.

17. ACCEL denies that FIRST BASE has breached its agreement with respect to the Purchase Order and denies all other allegations contained in ¶17 of Count II of the Complaint.

WHEREFORE, the Defendant, ACCEL, INC., an Ohio corporation, respectfully requests this Court dismiss Count II of the Complaint and to award to said Defendant all costs incurred in defending the same and for all other relief this Court deems just and necessary.

AFFIRMATIVE DEFENSES

NOW COMES the Defendant, ACCEL, INC., an Ohio corporation, hereinafter "ACCEL", by its attorneys, MAGGIO & FOX PROFESSIONAL CORPORATION, and as its Affirmative Defenses to Count II of the Complaint, states as follows:

AFFIRMATIVE DEFENSE NO. 1 - MODIFICATION OF PURCHASE ORDER

1. ACCEL states that the original Purchase Order between FIRST BASE FOR WOMEN, LLC and Plaintiff was modified by the parties after a meeting in Ohio on or about September 5, 2001.

2. The modifications were confirmed in a series of e-mails between FIRST BASE and Plaintiff. Copies of said e-mails are attached hereto as Group Exhibit "1" and incorporated herein by reference.

3. The Purchase Order was specifically modified to provide that FIRST BASE would only be obligated to purchase that amount of product, as defined in the Complaint, for which FIRST BASE had tendered prepayment. Furthermore, it was the understanding of FIRST BASE that no further product would be manufactured by Plaintiff until payment was received.

4. FIRST BASE has not requested the additional manufacture of product.

5. FIRST BASE is not required to tender further payment to Plaintiff on the basis of the September, 2001 modification to the Purchase Order.

6. Since there are no funds due and owing from FIRST BASE to Plaintiff there is no guaranty liability of ACCEL.

7. All amounts due and owing to Plaintiff have been paid.

AFFIRMATIVE DEFENSE NO. 2 - MITIGATION OF DAMAGES

1. Plaintiff has alleged that it has purchased materials and manufactured Product with respect to the Purchase Order involving FIRST BASE FOR WOMEN, LLC.

2. Plaintiff is required to mitigate its damages with respect to any materials it may have purchased or any product that it may have manufactured.

3. Plaintiff has failed to allege mitigation of damages in its Complaint.

Dated this 25th day of July, 2002.

ACCEL, INC., an Ohio corporation, Defendant

BY: MAGGIO & FOX PROFESSIONAL CORPORATION

BY:



Gregory A. Biegel

PREPARED BY:

Gregory A. Biegel

MAGGIO & FOX PROFESSIONAL CORPORATION

501 Seventh St., Suite 501

Rockford, IL 61104

(815) 968-5100

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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U. S. DISTRICT COURT

LODGING CONCEPTS, INC.,

Plaintiff,

vs.

FIRST BASE FOR WOMEN, LLC and
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Defendants.

Civil Action No. 02-C-50164

NOTICE OF FILING

TO: Richard A. Palmer, Esq.
WARD, MURRAY, PACE & JOHNSON, P.C.
202 East Fifth Street
P.O. Box 400
Sterling, IL 61081-0400

PLEASE TAKE NOTICE, that on the 25th day of July, 2002 the undersigned personally served the above-named, counsel for Plaintiff, with a copy of Defendant's, ACCEL, INC., **ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT, ACCEL, INC.** and hereby filed this NOTICE in the Clerk's office for the United States District Court, Northern District of Illinois, Western Division.

Dated this 25th day of July, 2002.

ACCEL, INC., Defendant

BY: MAGGIO & FOX PROFESSIONAL CORPORATION

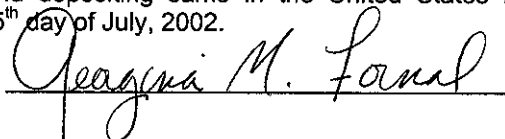
BY:


Gregory A. Biegel
One of its attorneys

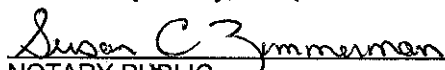
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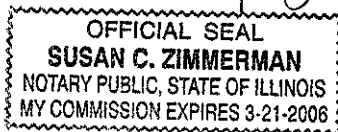
Gregory A. Biegel
MAGGIO & FOX PROFESSIONAL CORPORATION
501 Seventh St., Suite 501
Rockford, IL 61104
(815) 968-5100

The undersigned hereby states that a copy of the above NOTICE was served on the party as above addressed, in an envelope, sealed, postage prepaid, and depositing same in the United States Mail at Rockford, Illinois at or about the hour of 5:00 P.M. on the 25th day of July, 2002.



Subscribed and sworn to before me
this 25th day of July, 2002.


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Hotmail

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msn

Hotmail® juliasmith@bottmail.com

Index | Archive Page

From: Julie Amis <juliasmith@bottmail.com>

To: juliasmith@bottmail.com

Subject: Re: Meeting September 5

Date: Mon, 10 Sep 2001 08:34:49 -0400

Hi, George. Apparently, we had some problems with our system on Friday and none of our outgoing messages were sent, so here's a belated reply! I just got back from Chicago on Friday -- the bottles look great. Thanks! Shyla did mention that we were the box that on the first shipment, though, so you'll want to look into that.

Obviously, we didn't get a check to you last week and we recognize there will be a delay in the third shipment until that is received. We're OK with that and will get a check to you as soon as possible. Additionally, \$15,000 deposit should be on its way today.

Thanks for bringing up the Chicago label. I'm assuming those were already printed, but since they're not, we would like to take the opportunity to do them right. I've got someone working on it, but they're not sure what to do. It will be a good thing to have it with us when we get to Chicago on 9/12. I'll keep the number even and go ahead and print three early instruction manuals. On the opposite side, I'd like to print instructions for placement. Big that do-able from your end? Can you run a quick test to see if we can let the label go. I get you the art today, if you'll be able to get them to me by Friday or Monday of next week.

Thanks,
Julia

From: George <george@bottmail.com>
To: David Abraham <dabraham@bottmail.com>
Cc: Ray Roman <ray@bottmail.com>
Subject: Meeting September 5
Date: Mon, 10 Sep 2001 08:34:49 -0400

Dear David:

First I would like to thank you for your hospitality yesterday. The lunch and the conversation even better.

EXHIBIT

1

ALL-STATE LEGAL

Hotmail

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PAGE 14

Received: 8/25/01 12:14PM -> FROST BROWN TODD: Page 14
09/25/2001 11:42 7405494199 ACCEL INC

We would like to confirm our discussions about the balance of the payments for
FO91002 for First Base.
An additional \$15,000 will be sent to you to help with a deposit against the order.
This will increase the total amount of the deposit to \$50,000. This amount will be
applied to the first release unless a letter of credit is discussed previously. It is
provided, at which time the \$50,000 will be properly refunded.
2) You will provide a check in advance of each release and allow us two weeks to
manufacture and ship each release. The first release has already been received and
the second release is being manufactured today for delivery on Monday, September 10. The third
release will need a check by tomorrow to keep the schedule release date of September
14 for arrival on September 17.
It is important to also discuss with you the label "Mamogram" that is
pending the approval of the FDA. We have already made the new die required for this
new label and the release should be changed that we will have to invoice First Base
separately for the \$1000 for this die.
In addition, the label is for each separate month have not been ordered. Maybe we can
tie this in with the production run of the Mamogram label making both labels the
same size for March and only incurring a new die cost. But I don't know the details
further, this may or may not work.
We, Andy, Raymond and I, found our meeting yesterday to be very open and
forthright. We believe there is a tremendous opportunity to improve our discussions
further. Our next step is to discuss this with our current partner, Capital
Elastic.
Please advise how we are to proceed with future releases for First Base as soon as
possible.
Best regards, George
800.320.5983, extension 13

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